**Clinlab, Inc. *and* Service Employees International Union Local 627, AFL–CIO, CLC.** Case 8–CA–25839

March 30, 1995

## DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On April 26, 1994, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Clinlab, Inc., Austintown, Youngstown, and Warren, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Failing and refusing to bargain in good faith with Service Employees International Union, Local 627, AFL–CIO, CLC as the exclusive bargaining representative of its employees in the appropriate collective-bargaining unit by unilaterally changing its policy regarding the use of sick leave by forbidding unit employees to use sick leave to attend to the illness of family members.''

2. Substitute the following for paragraph 2(a).

''(a) Restore the sick leave policy which existed as of April 15, 1993, and permit unit employees to use sick leave to attend to the illness of family members.''

3. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In its exceptions, the Respondent contends that the judge's remedy goes beyond the complaint, which alleged only that the Respondent changed its sick leave policy by forbidding unit employees to use sick leave to attend to the illness of family members. Counsel for the General Counsel does not oppose a remedy which conforms to the scope of the pleadings. Accordingly, we shall modify the recommended Order to conform to the complaint allegation.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain in good faith with Service Employees International Union, Local 627, AFL–CIO, CLC as the exclusive bargaining representative of our employees in the appropriate collective-bargaining unit by unilaterally changing the policy regarding the use of sick leave by forbidding unit employees to use sick leave to attend to the illness of family members.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL restore the sick leave policy which existed as of April 15, 1993, and permit unit employees to use sick leave to attend to the illness of family members.

WE WILL make whole our unit employees who may have been detrimentally affected by the changes in terms and conditions of employment for any losses they may have suffered due to our unilateral changes and implementation, plus interest.

WE WILL on request, bargain collectively with the Union as the exclusive representative of our employees in the following appropriate unit concernig rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time MLTs, phlebotomists, medical assistants, receptionists, insurance clerks, CRTs, file clerks, collection clerks, deposit clerks and couriers, employed by Clinlab, Inc., at our Austintown, Youngstown, and Warren, Ohio, facilities, to wit, 1353 Market Street, Warren facility, our 945 Boardman-Canfield facility, our 25 N. Canfield-Niles Road facility, our 1350 Fifth Avenue, Youngstown, Ohio facility, but excluding medical directors, lab manager, assistant lab manager, tech supervisor, office manager, client rep. business supervisors, managers, professional employees, guards and supervisors as defined in the Act and all other employees.

CLINLAB, INC.

*Nancy Recko, Esq.*, for the General Counsel.
*Jon R. Steen, Esq.*, of Youngstown, Ohio, for the Respondent.

*Anthony P. Sgambati II, Esq. (Green, Haines, Sgambati, Murphy & Macala Co., L.P.A.)*, of Youngstown, Ohio, for the Charging Party.

## DECISION

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. The sole issue in this proceeding is whether Respondent, Clinlab, Inc., unilaterally changed an existing rule without bargaining with Service Employees International Union, Local 627, AFL–CIO, CLC (the Union). Because I find that it did, I conclude that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act.[1]

Jurisdiction is conceded. Respondent, an Ohio corporation, with offices located in Austintown, Youngstown, and Warren, Ohio, is engaged in the operation of a medical laboratory, at which blood specimens and cultures are taken and tests are performed. Annually, it purchases and receives at these facilities goods valued in excess of $50,000 from points outside Ohio. I conclude, as Respondent admits, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude, as Respondent admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act and that it was certified on April 20, 1993, as the exclusive collective-bargaining agent of the following unit, which constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time MLTs, phlebotomists, medical assistants, receptionists, insurance clerks, CRTs, file clerks, collection clerks, deposit clerks and couriers, employed by Clinlab, Inc. at its Austintown, Youngstown, and Warren, Ohio, facilities, to wit, 1353 Market Street, Warren facility, its 945 Boardman-Canfield Road facility, its 25 N. Canfield-Niles Road facility, its 1350 Fifth Avenue, Youngstown, Ohio facility, but excluding medical directors, lab manager, assistant lab manager, tech supervisor, office manager, client rep. business supervisors, managers, professional employees, guards and supervisors as defined in the Act and all other employees.[2]

An employer violates its duty to bargain in good faith with the representative of its employees if it unilaterally changes terms and conditions of employment without consulting the representative, bargaining with it, and reaching an impasse. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The General Counsel contends that, before the employees voted for the Union on April 9, 1993, as their bargaining representative, Respondent always permitted employees to take their children or other relatives for doctors' appointments and charge their own sick leave with the time missed. Respondent argues that it never had such a policy and that, when it announced in writing on April 16, 1993—''REMEMBER THAT SICK TIME IS ONLY TO BE USED WHEN YOU ARE ACTUALLY SICK OR YOU HAVE A SCHEDULED DOCTOR'S APPOINTMENT FOR *YOURSELF*. IF AN EMERGENY [sic] ARISES OR TIME NEEDED FOR OTHER PERSONAL REASONS, PERSONAL TIME OR VACATION TIME IS TO BE USED''—it was only repeating a rule that had been in effect before the Union was elected the employees' bargaining agent. Respondent contends that employees were never permitted to take sick leave even for their own appointments until after Respondent issued (October 1, 1991) its employee policy manual, effective January 1, 1992, which stated, in pertinent part:

> *PERSONAL DAYS*
>
> All full-time employees are entitled to two paid personal days per year. All part-time employees are entitled to one personal day (8 hours) per year. Personal days cannot be taken during the first six months of employment. Personal days must be requested in writing to the supervisor at least two weeks in advance.
>
> *SICK TIME*
>
> All employees are eligible for sick days. Sick pay will be accumulated at a rate of .023 hours per hour worked, not to exceed 4 hours per month. Sick time may be accumulated to a maximum of 240 hours.
>
> Paid sick time may be used for doctor and dentist appointments. The time must be used in two hour increments.

Under Respondent's old rule, employees' unused sick leave either accumulated or was credited each year to their paid vacation time. Respondent's supervisors told the employees only that they would no longer be permitted to apply their unused sick leave to their vacations. They said nothing about the fact that, for the first time, Respondent would pay for sick time for appointments with doctors and dentists. The language of the rule does not specifically prohibit employees from requesting sick leave for their loss of time taking relatives to the doctor's, and the employees began to take leave to accompany their relatives to not only doctors' appointments but also to other engagements. Deborah Anderson received sick leave time on November 4 and December 4, 1992, and January 19, 1993, when she accompanied her daughter to a doctor, to an eye doctor, and to Respondent for blood work, respectively. On August 20, 1992, when Loretta Nagel was advised that her father had fallen at home and had been taken to the hospital, she obtained permission to leave work and was paid sick leave. On October 13, 1992, Joellen Manz took sick leave to take her child to a medical appointment.

Respondent contends that the employees told it only that they were sick and denied that its supervisors ever gave the employees permission to take sick leave to accompany members of their families to medical appointments. I discredit all testimony in support of that contention. First, the supervisors' denials were general and were not specific about any of the incidents related by the General Counsel's witnesses. Anderson testified that she told Brenda Ohlin, her immediate supervisor and a billing supervisor, or Office Manager

[1] The relevant docket entries are as follows: The Union filed the unfair labor practice charge on October 5, 1993; the complaint issued on November 18, 1993; and the hearing was held in Youngstown, Ohio, on March 10, 1994.

[2] The complaint's allegation of the appropriate unit, which was admitted by Respondent, inadvertently omitted the names of the cities or towns of two of the facilities at which Respondent conducted its business. I have amended the description to correct the omission.

Norine Blasko, or both, the precise reason that she was leaving work or not going to work each time that she was taking someone to the doctor and reviewed the reasons with Blasko when she checked the time records every 2 weeks. Nagel testified with similar specificity. Second, Respondent's denials were particularly belied by the incident when Anderson left her work and brought her daughter back to Respondent for blood tests and still took sick leave. Respondent thus had notice that she, as an employee, was using sick leave to accompany her relative to a medical appointment. In addition, on March 30, 1992, Nagel's daughter told her that she was receiving an award at school. When Nagel told Blasko, Blasko suggested that she leave for 2 hours to attend the ceremony at school. Nagel reported that time as sick leave and was paid as if she were sick. Similarly, Anderson applied on March 30, 1993, for 2 hours of sick leave on April 8 to take her daughter to a bus going to a church convention. Blasko approved the request, and Anderson was paid sick leave for those 2 hours.[3]

Third, Manz, a former employee of Respondent, had nothing to gain if the General Counsel proved his case and the change is rescinded. She was the only disinterested party in this proceeding, and, if only for that reason, I credit her. Typically, Manz would telephone Respondent early in the morning with advice that she was not coming to work that day and her reason. Anderson, the receptionist, would relay the employees' messages to the appropriate supervisors. That she did so is evidenced by Ohlin's knowledge of Manz' child's illness because she asked her how the child was the next day that Manz came to work. Blasko denied that Anderson ever told its supervisors anything because she was a very private person. That may have been a reason that Anderson would not tell her supervisors about her own problems, a conclusion that I cannot agree with in light of Anderson's solid and detailed testimony, but would not have been a reason that Anderson would not give detailed messages from other employees, such as Manz, who related the reasons that they were not reporting to work. I do not believe Blasko. Fourth, Ohlin's explanation was similarly implausible. She testified that she had earlier denied a request of employee Croutch for sick leave when she wanted to accompany a child to the doctor; yet Ohlin, when faced with a new but similar request, had to check with Blasko to ascertain whether Respondent's policy had changed. If there had been a strict policy before, there would have been no reason to check again. I simply do not believe her. Finally, when Respondent issued its rule after the Union was elected, Nagel was upset to hear of the policy. She would not have been so emotional had she believed that Respondent was merely reiterating a rule that had been in existence for years.

Respondent contends that the General Counsel's witnesses should not be credited because they testified that they had received sick leave for certain days that they actually worked. However, the witnesses did not have the benefit of examining Respondent's time records when they reviewed their own payroll receipts for 2 years and tried to match them with their doctors' bills. Furthermore, Respondent's records showed that these employees received sick pay for other dates, and they may have merely confused the dates that they testified to. I am persuaded that five incidents is enough to prove that the rule existed and the Respondent generally permitted employees to leave for others' medical appointments, as well as events that were not even covered under the sick leave rule, such as a child's award ceremony. Blasko's general denial that she paid anyone sick leave when the employee was not sick holds little weight, for example, against Nagel's precise recollections. I thus credit Nagel's testimony that Blasko specifically stated in the presence of a few other employees that, under the new policy, employees could take their children and family members to the doctor's. I also credit Nagel who testified that, when she complained about the April 16 announcement, Blasko explained that the announcement was made because employees had been abusing the rule. It is probable that Respondent was merely trying to stop the employees from continuing, as they had in the past, to obtain paid sick leave when the employees were not sick. That represents a change.

Finally, Respondent contends that in October 1992 it told employee Nancy Croutch that she could not take sick time to take her son to see a doctor, but had to take personal time. Respondent thus contends that the complaint is barred by 10(b)'s 6-month statute of limitations. Even if I credited that testimony (unrebutted, because Croutch did not testify), Respondent did not inform a single other employee of its purported policy. Thus, the employees had no notice of the rule, nor did the Union; and the unfair labor practice charge was timely. *Patsy Trucking*, 297 NLRB 860, 862–863 (1990).

The announced change came forth only after the Union was elected the employees' bargaining agent, and that established Respondent's duty to bargain with the Union before making any changes in the terms and conditions of employment. *Toyota of Berkeley*, 306 NLRB 893 (1992). It did not. I conclude that Respondent's unilateral change, without notice to and bargaining with the Union, violated Section 8(a)(5) and (1) of the Act.

The unfair labor practices found herein, occurring in connection with Respondent's business, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall order Respondent to restore the terms and conditions of employment of all unit employees as they existed on April 15, 1993, and to make all unit employees whole for any loss of wages and benefits they may have suffered as a result of the unlawful change. Backpay shall be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record in this proceeding, including my observation of the demeanor of the witnesses as they testified, and my

[3] In the same application, she also wanted paid sick leave on May 6 to take her daughter to a bus for a band trip. Respondent denied that application, because the trip occurred after Respondent's change of its rule on April 16.

consideration of the briefs filed by the General Counsel and Respondent, I issue the following recommended[4]

## ORDER

The Respondent, Clinlab, Inc., Youngstown, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with Service Employees International Union, Local 627, AFL–CIO, CLC (the Union) as the exclusive bargaining representative of its employees in the appropriate collective-bargaining unit by unilaterally changing the terms and conditions of employment of its employees without having first bargained to impasse with respect to the terms and conditions of employment that it implemented.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore all terms and conditions of employment to the status quo as of April 15, 1993.

(b) Make whole its unit employees who may have been detrimentally affected by the changes in terms and conditions of employment for any losses they may have suffered due to its unilateral changes and implementation, in the manner set forth in the remedy section of this decision.

(c) On request, bargain collectively with the Union as the exclusive representative of its employees in the following appropriate unit concerning rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time MLTs, phlebotomists, medical assistants, receptionists, insurance clerks, CRTs, file clerks, collection clerks, deposit clerks and couriers, employed by Clinlab, Inc. at its Austintown, Youngstown, and Warren, Ohio, facilities, to wit, 1353 Market Street, Warren facility, its 945 Boardman-Canfield Road facility, its 25 N. Canfield-Niles Road facility, its 1350 Fifth Avenue Youngstown, Ohio facility, but excluding medical directors, lab manager, assistant lab manager, tech supervisor, office manager, client rep. business supervisors, managers, professional employees, guards and supervisors as defined in the Act and all other employees.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Austintown, Youngstown, and Warren, Ohio facilities copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

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[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''